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AWH EQUITY HOLDINGS SDN BHD & ORS v. GMV-BORCOS SDN BHD (DALAM LIKUIDASI SUKARELA)

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD FAIRUZ ZAINOL ABIDIN JC
[SUIT NO: WA-24NCC-629-11-2018]
B 11 JULY 2019

COMPANY LAW: *Liquidation – Voluntary liquidation – Application to proceed with suit against company in voluntary liquidation – Suit premised on breach of agreement, negligence, tortious duty of care, misrepresentation and vicarious*
C *liability – Whether applicant satisfied requirements under s. 451 of Companies Act 2016 – Whether suit could be dealt by winding-up court – Whether there was prima facie case to warrant granting of leave – Whether leave to commence proceedings may be granted retrospectively – Whether there was basis to restrict applicants from enforcing judgment against company should applicants succeed in suit – Whether*
D *suit had sufficient degree of complexity*

The second and third applicants were the director and former director, respectively, of the first applicant. The first applicant and the respondent had entered into a sale and purchase agreement ('SPA') for the purchase of shares in a company. When disputes arose, the bank filed an action against the
E applicants to seek monetary judgment against them in their capacity as guarantors to the company. The applicants commenced a suit against, among others, the respondent, seeking various declarations and specific performance, premised on several causes of action, *inter alia*, breach of the SPA, negligence, tortious duty of care, misrepresentation and vicarious
F liability ('suit'). The applicants later filed the present application, seeking leave pursuant to s. 451 of the Companies Act 2016 ('Act'), to proceed with the suit against the respondent as the latter was placed under the creditor's voluntary liquidation. In support of their application, the applicants submitted that (i) they have satisfied the requirements under s. 451 of the
G Act; (ii) the suit could not be dealt with by a winding-up court and there was a *prima facie* case to warrant granting of leave; (iii) leave to commence proceedings against the respondent, pursuant to s. 451 of the Act, may be granted retrospectively; (iv) there was no basis to restrict the applicants from enforcing any judgment against the respondent should the applicants succeed in the suit; and (v) the suit that they intended to pursue had sufficient degree
H of complexity which involved multiple causes of action. Refuting the applicants' application, the respondent submitted that, *inter alia*, even if the applicants had a *prima facie* case, the suit should be resolved by way of proof of debt.

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Held (allowing application with costs in cause):

(1) Courts will act as the gatekeeper in determining whether leave should be granted. Once the requirements are fulfilled, it matters not if leave is late or obtained after the commencement of the particular action. In discharging its discretion, the courts would have a duty to consider the interest of all parties. This will include the interest of the applicants in order to avoid meritorious claims from being shut out. (paras 48 & 49)

(2) Section 451 of the Act is *pari materia* with s. 263 of the Companies Act 1965 ('CA 1965'). Having determined that the remedy could not be adequately provided by the winding-up court, the applicants had a duty to demonstrate that they had a real dispute and a *prima facie* case against the respondent. To justify the granting of leave under s. 226(3) of the CA 1965, apart from establishing that the winding-up court is unable to adequately address the claim in the winding up process, there is also a requirement to show the existence of a *prima facie* case against the wound up company. As to what constitutes a *prima facie* case, it does not necessarily mean that every element of the case be proven. (paras 18-20)

(3) A reading of the reliefs sought by the applicants clearly showed that they were seeking several heads of remedies. Declarations and specific performance orders are not appropriate to be made by a winding-up court. (paras 23 & 27)

(4) The rationale as to why leave from court is required, before initiating an action against companies that have been wound up, is very much due to the courts wanting to have cognisance of the legal challenges faced by a company in liquidation so that it is not harassed and its assets wasted by unnecessary liquidation. The leave of court is required as a safeguard. (para 33)

(5) According to the applicants, the suit that they intended to pursue had sufficient degree of complexity which involved multiple causes of action; this included questioning the creditor's voluntary winding-up of the respondent. There were valid reasons for the applicant to highlight this point as it would not be appropriate for a winding-up court to determine the issues. It plainly fell outside the purview of the winding-up court. Filing a proof of debt was entirely inappropriate. The applicants succeeded in demonstrating that there was a real dispute and a *prima facie* case that would warrant the court to exercise its discretion to allow for leave to be granted. (paras 33, 34 & 36)

(6) Based on case laws, leave may be granted retrospectively after the commencement of proceedings. The proceedings would not be a nullity for want of prior leave. There is no express prohibition in s. 451(2) of the Act to the like effect. It would be a different consideration if there is an express prohibition in the language of the legislation to disallow any party from seeking leave retrospectively. Furthermore, the provision does not stipulate the consequence of such non-compliance. (paras 42 & 46)

Case(s) referred to:
Adorian v. Commissioner of Police of the Metropolis [2009] 1 WLR 1859 ***(refd)***
Bank of Ireland v. Colliers International UK Plc (In Administration) [2013] Ch 422 ***(refd)***
Capita Financial Group Ltd v. Rothwells Ltd (No 2) [1989] 7 ACLC 634 ***(refd)***
Emanuele v. Australian Securities Commission [1997] HCA 20 ***(refd)***
Gaardsoe v. Optimal Wealth Management Ltd (In Liquidation) [2013] Ch 298 ***(refd)***
Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika Holdings Bhd [2018] 2 CLJ 401 CA ***(refd)***
Humphris v. Jenshol [1997] 25 ACSR 212 ***(refd)***
In Re Saunders (A Bankrupt) [1997] Ch 60 ***(refd)***
Mesuntung Property Sdn Bhd v. Kimlin Housing Development Sdn Bhd [2014] 7 CLJ 202 CA ***(refd)***
Mosbert Berhad (In Liquidation) v. Stella D'Cruz [1985] 1 LNS 47 FC ***(refd)***
Oceanic Life Ltd v. Insurance and Retirement Services Pty Ltd (In Liquidation) [1993] 11 ACSR 516 ***(refd)***
Re MJBCH Ltd (In Liquidation) [2013] 1 IR 407 ***(refd)***
Re Sydney Formworks Pty Ltd (In Liquidation) [1965] NSWR 646 ***(refd)***
Shencourt Sdn Bhd v. Perumahan NCK Sdn Bhd [2008] 3 CLJ 582 CA ***(refd)***
Vagrand Pty Ltd (In Liquidation) v. Fielding & Ors [1993] 11 ACLC 411 ***(refd)***

Legislation referred to:
Companies Act 2016, s. 451(2)
Companies Act 1965 (repealed), ss. 226(3), 263

For the applicants - Sunil Abraham & Austen Pereira; M/s Cecil Abraham & Partners
For the respondent - Lee Shih & Janice Ooi; M/s Skrine

Reported by Najib Tamby

JUDGMENT

Ahmad Fairuz Zainol Abidin JC:

Introduction

[1] The applicants sought leave under s. 451 of the Companies Act 2016 ("the Act") to proceed with Kuala Lumpur Civil Suit No: WA-22NCC-82-02-2019 ("the suit") against the respondent as the respondent was placed under creditor's voluntary liquidation on 30 June 2017.

[2] At the conclusion of the proceedings, this court allowed the amended originating summons at encl. 13. The following are the grounds of decision of this court.

Background

The background of the matter are as follows:

[3] The first applicant is a private listed company limited by shares. It is an investment holding company. The second applicant is one of the directors of the first applicant. The third applicant was a former director of the first applicant.

[4] The respondent is also the first defendant in the suit. It is an investment holding company which is currently in creditor's voluntary liquidation pursuant to a resolution passed during its first creditors' meeting on 30 June 2017, with the appointment of Kevin Low Ee Ming as the liquidator on 30 June 2017. Global Maritime Ventures Berhad, the second defendant in the suit is a venture capital investment holding company. The third defendant in the suit is Bank Pembangunan Malaysia Berhad while the fourth defendant, Mohd Zafer bin Mohd Hashim, is the former director and president/managing director of the third defendant. Messrs Ram Reza & Muhammad, the fifth defendant in the suit is a law firm which represented the respondent at all material times during the contractual negotiations and the completion of the sale and purchase agreement dated 15 January 2013 ("the SPA"). The SPA is for the purchase of shares in Syarikat Borcos Shipping Sdn Bhd ("the company") by the respondent/first defendant in the suit.

[5] The first applicant was the registered and beneficial owner of 2,925,000 ordinary shares in the company, representing 65% of total issued and paid-up ordinary shares. The respondent was the registered and beneficial owner of 1,575,000 ordinary shares in the company, representing 35% of total issued and paid-up ordinary shares in the company.

[6] Pursuant to the SPA, the respondent agreed to purchase a total of 2,925,000 ordinary shares of RM1 only each ("the sale shares") in the company from the first applicant representing 65% of total issued and paid-up ordinary shares, for a purchase price of RM190,450,000 ("purchase price"). As a direct result of the completion of the SPA and transfer of the sale shares, the respondent is now the sole owner of 100% of all total issued and paid-up ordinary shares in the company.

[7] Prior to the execution of the SPA, the applicants had given several guarantees and indemnities ("guarantees and indemnities") to various parties who had advanced credit and other banking facilities to the company and its various subsidiaries.

[8] The respondent was subsequently put under a creditors' voluntary liquidation on 30 June 2017.

[9] On 12 January 2018, Maybank Islamic Berhad ("MIB") filed an action against the applicants to seek monetary judgment against them in their capacity as guarantors to the company ("the MIB suit"). Summary judgments were entered on 27 July 2018 against the applicants and the applicants' application to strike out writ and statement of claim was dismissed.

[10] On 23 November 2018, the applicants commenced the suit against the defendants, seeking various declarations and specific performance, premised on several a causes of action, among others, breach of the SPA, negligence, tortious duty of care, misrepresentation and vicarious liability.

[11] Six days later, the applicants filed this originating summons seeking leave to proceed against the respondent.

Parties' Contention

[12] It is the contention of the applicants that they have satisfied the requirements under s. 451 of the Act. It was contended that the suit cannot be dealt by a winding-up court and that there is a *prima facie* case to warrant leave being granted. The appellants further argued that leave to commence proceedings against the respondent pursuant to s. 451 of the Act may be granted retrospectively. It was also highlighted to this court that there was no basis to restrict the applicants from enforcing any judgment against the respondent should the applicants succeed in the suit.

[13] The respondent in refuting the contention of the applicants submitted that a literal reading of s. 451(2) of the Act will not allow for an application for leave to be made retrospectively. It was submitted further that leave ought not to be granted given that the applicants have failed to establish a *prima facie* case against the respondent in that:

(i) clause 3A.1 of the SPA which is the applicants' key cause of action is vague and uncertain and therefore cannot be enforced;

(ii) the second and third applicants are not parties to the SPA; and

(ii) even if the applicants have a *prima facie* case, the suit should be resolved by way of proof of debt.

[14] The arguments made by the parties will be dealt with in the rest of this judgment.

Analysis

[15] Section 451 of the Act which is in *pari materia* with s. 263 of the Companies Act 1965 ("1965 Act") has been discussed in many cases within and outside of the country. This court in determining the principles applicable in considering the granting of leave rests on the following tests which are settled principles in this area.

First Test: That The Remedy Will Not Be Dealt With Adequately By A Winding-Up Court

[16] In *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446, Seah SCJ, laying down the principles that have been applied over the years as follows:

> … *In re Cuthbert Lead Smelting Co Ltd* [1886] WN 84 it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an applicant for leave if his claim cannot be dealt with adequately in the winding up or if the remedy he seeks cannot be given to him in a winding up proceedings.

[17] Similarly in *Shencourt Sdn Bhd v. Perumahan NCK Sdn Bhd* [2008] 3 CLJ 582 the Court of Appeal reiterated the principles of *Mosbert* (*supra*), opined as follows:

> [11] On the guiding principle for the court to grant leave with a view to commencing action against a company that has been wound up, we would like to refer to the case of *Mosbert Berhad (In Liquidation) v. Stella D'Cruz* [1985] 1 LNS 47; [1985] 2 MLJ 446 wherein Seah SCJ, in delivering the judgment of the Supreme Court at p. 447 had this to say:
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> > *In re Cuthbert Lead Smelting Co Ltd* [1886] WN 84 it was held that if the applicant could obtain all the relief in the winding up leave would be refused. In short, the Court will always give an application for leave if his claim cannot be dealt with adequately in the winding up or if the remedy, he seeks cannot be given to him in a winding up proceedings.
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> [12] It is clear, based on the above cited case authority, leave to proceed would only be granted when the plaintiff's claim cannot be adequately dealt with in winding up of the defendant's company or when the plaintiff is seeking a remedy which cannot be given in the winding up of the defendant's company.

Second Test : Requirement Of A Real Dispute And Prima Facie Case

[18] Having determined that the remedy cannot be adequately provided by the winding-up court, the applicants have a duty to demonstrate to this court that they have a real dispute and that they have a *prima facie* case against the respondent.

[19] The Court of Appeal in *Mesuntung Property Sdn Bhd v. Kimlin Housing Development Sdn Bhd* [2014] 7 CLJ 202 established that to justify the granting of leave under s. 226(3) of the 1965 Act, apart from establishing that the winding-up court is unable to adequately address the claim in the winding-up process, there is also a requirement to show the existence of a *prima facie* case against the wound-up company.

[20] As to what constitutes a *prima facie* case, the courts have determined that it does not necessarily mean that every element of the case be proven. In *Vagrand Pty Ltd (In Liquidation) v. Fielding & Ors* [1993] 11 ACLC 411 the Federal Court of Australia held as follows:

> There are authorities in which the term "*prima facie* case" has been used to describe the case required to be demonstrated by an applicant for leave. **But we are not aware of any case in which it has been held that an applicant must adduce evidence of every element of its claim. To impose that burden would be to shut out many meritorious claims.** It is commonplace for actions against companies to depend upon documentary evidence. Until there is discovery of relevant documents, it may be impossible for an applicant to prove each element in its case. On occasions, it may also be necessary for the applicant to interrogate the respondent or subpoena other parties. These steps cannot be taken until the action is commenced.
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> (emphasis added)

[21] The Court of Appeal in *Mesuntung* (*supra*) had succinctly summarised the position of law when considering leave under s. 226(3) of the 1965 Act to be as follows:

> [24] From the above authorities, the appellant has the burden of satisfying the court of two criteria:
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> (a) The appellant's claim cannot be adequately dealt with by the winding up court; and
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> (b) The appellant has a *prima facie* case against the respondent.
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> …
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> [27] As to what amounts to *prima facie* in the context of s. 226(3) of the Companies Act, **in our view is simply whether there is a serious dispute between the litigants which warrant a trial to determine the truth of the combating allegations.** It is not unlike the court's approach when dealing with an application to strike out under O. 18 r. 19 Rules of Court 2012

despite the consideration that the liquidator ought not to be burdened with wasteful financial resources in defending frivolous legal actions. That consideration in our view is also a consideration for other suits not involving wound up companies as all defendants should also not be burdened with financial resources to defend frivolous legal actions.

(emphasis added)

The Applicants' Case

[22] It is perhaps instructive to reproduce the reliefs claimed by the applicants in the suit. In the amended statement of claim, the applicants sought the following reliefs:

(1) A declaration that the First, Second and/or Third Defendants breached the express conditions of the SPA by failing to fully and effectually discharge and release the Plaintiffs from the Corporate and Personal Guarantees, post completion of the SPA;

(2) A declaration that the First, Second and/or Third Defendants breached the express conditions of the SPA by failing to keep the Plaintiffs informed of its progress and/or efforts to fully and effectually discharge and release the Plaintiffs from the Corporate and Personal Guarantees, post completion of the SPA;

(3) A declaration that the First, Second and/or Third Defendants are under an express and/or implied indemnity and/or legal and/or equitable duty to indemnify the Plaintiffs against all losses and damages suffered by the Plaintiffs, including but not limited to Maybank's claim above;

(4) A declaration that the First, Second and/or Third Defendants owe a specific common law duty of care in tort (as a competent investment holding company and/or investment bank and as the lawful registered and beneficial owner of the Company) to the Plaintiffs, to effectually and fully discharge the Plaintiffs from the Corporate and Personal Guarantees, post completion of the SPA;

(5) A declaration that the First, Second and/or Third Defendants breached its specific common law duty of care in tort (as a competent investment holding company and/or investment bank and as the lawful registered and beneficial owner of the Company) to the Plaintiffs, to effectually and fully discharge the Plaintiffs from the Corporate and Personal Guarantees, post completion of the SPA;

(6) A declaration that the First, Second and/or Third Defendants owe a specific common law duty of care in tort (as a competent investment holding company and/or investment bank and as the lawful registered and beneficial owner of the Company) to the Plaintiffs, to ensure that new Corporate and Personal Guarantees were properly executed and/or renewed with Maybank, post completion of the SPA;

A (7) A declaration that the First, Second and/or Third Defendants owe a specific common law duty of care in tort (as a competent investment holding company and/or investment bank and as the lawful registered and beneficial owner of the Company) to the Plaintiffs, in failing to ensure that new Corporate and Personal Guarantees, were properly executed and/or renewed with Maybank, B post completion of the SPA;

(8) A declaration that the Fourth Defendant and/or Fifth Defendant be also personally liable to indemnify the Plaintiffs against all losses and damages suffered by the Plaintiffs, including but not limited to Maybank's claim above;

C (9) An order for specific performance by the First, Second and or Third Defendants to indemnify the Plaintiffs against all losses and damages suffered by the Plaintiffs, including but not limited to Maybank as per its claim above, pursuant to Clause 3A.1 (c) of the SPA;

D (10) Further or alternatively, general, aggravated, exemplary or punitive damages for breach of the SPA and/or breach of the specific common law duty of care in tort;

(11) Interest at the rate of 5% or any other rate as this Honourable Court deems fit and proper calculated from the date of judgment until E final settlement;

(12) Costs, and/or

(13) Such further relief or other relief as this Honourable Court may deem just.

F **[23]** From the reading of the reliefs sought by the applicants, it is clear that they are seeking several heads of remedies. This includes declarations and orders for specific performance.

[24] The respondent in opposing this application argued that the applicants should file a proof of debt for the determination by the liquidators. In G considering this proposition, this court perused the cases which spelt when winding-up courts are not able to adequately deal with in situations where the reliefs sought were in the nature of those stated in the amended statement of claim.

[25] The Court of Appeal in *Ganda Setia Cemerlang Sdn Bhd & Anor v. Maika* H *Holdings Bhd* [2018] 2 CLJ 401; [2017] 6 MLJ 661 provided the clearest guidance to this court in determining this matter. The Court of Appeal held as follows:

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[41] With respect, we cannot agree with the learned judge. Contrary to the view of the learned judge, *the remedy of specific performance remains one which the winding up court cannot make; and certainly, it is not a remedy that can be resolved through the lodgment of a proof of debt with the liquidators of the respondent. That order is properly in the jurisdiction of the court in exercise of its civil jurisdiction, and granted, if at all, after trial.* The presence of the alternative prayer (b) in the terms set out at p. 81 of the record of appeal does not alter that view. There may be a difference, perhaps, if the relief was couched as an additional relief. The order of specific performance is a discretionary remedy and the law on pleadings allows for this alternative remedy in the event this specific performance is not granted. That however, does not diminish the significance of the remedy as a primary or main remedy. In the weighing of discretion, the court will always question the issue of adequateness of damages as an alternative remedy. *It is precisely because damages is not an adequate remedy that specific performance is sought; but in the event the court is not with the appellants, then the appellants want to be allowed this avenue. We do not see how by this alternative plea, leave to commence action against the respondent should be denied.*

…

[48] Finally, we note that the learned judge had expressed the view that the order of specific performance cannot be granted against the respondent because it will cause financial hardship; or be counter-productive to the object of winding up the respondent, which is to preserve the assets of the respondent for fair distribution. *Here, once again, we must remind that it is not for the winding up court to decide whether an order of specific performance ought to be granted on the particular facts; that is the function and role of the civil court in the event leave to commence litigation is allowed.* The winding up court should not be second-guessing what that court, may or may not eventually decide on the merits. That is entirely within the purview of the civil court.

(emphasis added)

[26] In *Shencourt* (*supra*) the Court of Appeal had a similar situation to deal with where the relief sought by the plaintiff therein had a counterclaim with a declaratory relief. The court categorically ruled that such declaratory orders cannot be dealt with adequately by the winding-up court (see at paras. 13 and 14 of *Shencourt* (*supra*)).

[27] This court is of the firm view that declarations and specific performance orders are not appropriate to be made by a winding-up court based on the *dicta* in *Ganda* (*supra*) and *Shencourt* (*supra*).

Rationale For Leave

[28] In *Shencourt* (*supra*), several cases were discussed by the Court of Appeal. It is in that germane decision that this court finds the rationale why leave from court is required before initiating an action against companies that have been wound up.

[29] In *Vagrand Pty Ltd (In Liquidation) v. Fielding & Ors* [1993] 11 ACLC 411 the Federal Court of Australia held as follows:

> The reason for imposing a requirement of leave, in the case of litigation against companies in liquidation, was explained a century ago by Manning J, of the New South Wales Supreme Court, in *Thomson v. Mulgoa Irrigation Co Ltd* (1893) 4 BC (NSW) 33:
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> > All that s. 140 means **is that a company in liquidation is not to be harassed and its assets wasted by unnecessary litigation, and the leave of the Court is therefore required as a safeguard.** Before any action can be brought or continued against a company, the Court must investigate the intended litigation.
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> (emphasis added)

[30] In *Re Sydney Formworks Pty Ltd (In Liquidation)* [1965] NSWR 646, McLelland CJ in Eq expressed the reason for the requirement of leave in this way:

> This view is in keeping with what I consider to be the obvious intention of the section, namely, *to ensure that the assets of the company in liquidation will be administered in accordance with the provisions of the Companies Act and that no person will get an advantage to which, under those provisions, he is not properly entitled, and to enable the Court effectively to supervise all claims brought against the company which is being wound up.*
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> (emphasis added)

[31] In *Capita Financial Group Ltd v. Rothwells Ltd (No 2)* [1989] 7 ACLC 634, Rogers CJ held as follows:

> It is necessary to understand the rationale which buttresses the requirement for showing the existence of a *prima facie* case. *The provisional liquidators and liquidator, respectively, are entitled to be protected from involvement in court proceedings which may be perhaps only of a nuisance nature, or which may be thought to be totally devoid of any substance.* The resources of the company in liquidation should not be frittered away in defending baseless claims.
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> It seems to be that it is considerations of this nature which have led the courts uniformly over the years to demand that there be evidence showing a *prima facie* case. As Mr Reeves, for the provisional liquidators, pointed out, the requirement goes back to a decision of Manning J in *Thomson v. The Mulgoa Irrigation Co. Ltd* [1894] 4 NSW Bankruptcy Company and Probate Cases 33. As His Honour pointed out:
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> > The Court will strain a point to avoid the absurdity of merely requiring the same pleadings to be put on the file again so as to make the matter merely one of costs; but grounds must be shewn on the merits, which would justify the court in granting leave in the first instance. The plaintiff should pledge his oath that he has a valid an unimpeachable document. *All that s. 140 means is that a company in liquidation is not to be harassed and its assets wasted by*

> *unnecessary liquidation and the leave of the court is therefore required as a safeguard. Before any action can be brought or continued against a company, the court must investigate intended litigation.*
>
> This approach has been maintained thereafter in successive decisions of courts. (See *Re Sydney Formworks Pty Ltd (in liq)* (1965) NSWR 646 at p. 650; *Re A.J. Benjamin Ltd (in liq)* (1969) 90 WN (NSW) 107 at p. 109; *Re Harry B Harvey Pty Ltd (in liq)* (1971-1973) CLC 40-051; *Ex Parte Walker* (1982) 6 ACLR 423 at p. 426; *Ogilvie-Grant & Anor v. East* (1983) 1 ACLC 742 at p. 744; and *Maclean v. Burns Philp Trustee Co Pty Ltd & Ors* (1985) 2 NSWLR 623 at p. 646).
>
> (emphasis added)

[32] The three cases were quoted with approval in *Shencourt* (*supra*). It is therefore clear that the rationale for leave is very much due to courts wanting to have cognisance of the legal challenges faced by a company in liquidation so that it is not harassed and its assets wasted by unnecessary liquidation. The leave of the court is required as a safeguard.

Complexity Of Issues

[33] During the course of submissions, counsel for the applicants had also raised two other issues to further bolster their contention of why this court should grant leave under s. 451 of the Act. Firstly, counsel contended that the suit that they intend to pursue had sufficient degree of complexity which involves multiple causes of action. It includes even questioning the creditors' voluntary winding-up of the respondent. Reference was made to para. 43(i) to (v) of the amended statement of claim which reads as follows:

> i. The voluntary winding up of the First Defendant was done for no reason other than to defeat and/or stifle the Plaintiffs' right to be indemnified pursuant to Clause 3A.1 of the SPA;
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> ii. The voluntary winding up of the First Defendant was made with full awareness and/or knowledge that the First, Second and/or Third Defendant has an obligation to indemnify the First Plaintiff, pursuant to Clause 3A.1 of the SPA, against all losses and damages suffered by the Plaintiffs;
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> iii. The voluntary winding up of the First Defendant was made, notwithstanding the numerous correspondences from Maybank (as described in paragraph 29 above) requesting for new Corporate and Personal Guarantees and/or various Letters of Comfort or Undertaking from the First, Second and/or Third Defendant, in respect of the various banking facilities;
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> iv. By failing to provide the requisite notices to the First Plaintiff to attend the creditors meeting on 30.06.2017;

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v. By failing to disclose the liability that the First Defendant was owing on the indemnity to the First Plaintiff in the Statement of Affairs and/or Statement of the Position in the Winding Up, in light of Clause 3A.1 of the SPA.

[34] This court is of the view that there were valid reasons for counsel to B highlight this point as it would not be appropriate for a winding-up court to determine the issues. It plainly falls outside the purview of the winding-up court. Quite clearly, this court will not hesitate to rule that filing a proof of debt is entirely inappropriate.

[35] In *Shencourt* (*supra*), the Court of Appeal remarked that "… the extent C and seriousness of the defects wherein there would be some degree of complexity of issues involved, it is unlikely that the defendant's liquidators can adequately deal with the plaintiff's counter-claim and quantify the damages suffered in the winding up of the defendant." This court is in full agreement with the above *dicta* as complexity of issues would only be D adequately dealt by a court other than a winding-up court.

[36] It is based on the above reasons that this court is of the firm view that the applicants have succeeded in demonstrating that there are a real dispute and *prima facie* case that would warrant this court to exercise its discretion to allow for leave to be granted.

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Whether Leave Can Be Granted Retrospectively

[37] Both parties conceded there are no local authorities that have dealt on this exact issue. This court was furnished with foreign authorities by the applicants to support their argument. However, before proceedings F commenced, parties informed this court that the issue will not be contested.

[38] Be that as it may, it is apposite for this court to consider this point of law in light of the authorities submitted before this court. It is perhaps useful to state the applicable position in law, one which this court would have taken regardless of the concession made by the respondent in this case.

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[39] The position under English law and Irish law is substantially the same as both laws recognise that leave may be granted retrospectively. It is to be noted that the wordings of the English and Irish positions with regard to leave are worded as follows:

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(a) Section 130(2) of the UK Insolvency Act 1986:

(2) When a winding-up order has been made or a provisional liquidator has been appointed, **no action or proceeding shall be proceeded with or commenced against the company or its property, except by leave of the court** and subject to such terms as the court may impose.

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(b) Section 222 of the Irish Companies Act 1963:

> 222. – When a winding-up order has been made or a provisional liquidator has been appointed, **no action or proceeding shall be proceeded with or commenced against the company except by leave of the court** and subject to such terms as the court may impose.
>
> (emphasis added)

[40] The wordings in the above provisions are largely similar to s. 451(2) of the Act. As such, reference to the English and Irish authorities provide good guidance. (see *In Re Saunders (A Bankrupt)* [1997] Ch 60; *Adorian v. Commissioner of Police of the Metropolis* [2009] 1 WLR 1859; *Gaardsoe v. Optimal Wealth Management Ltd (In Liquidation)* [2013] Ch 298; *Re MJBCH Ltd (In Liquidation)* [2013] 1 IR 407 and *Bank of Ireland v. Colliers International UK Plc (In Administration)* [2013] Ch 422).

[41] Similarly, this court also referred to the authorities decided under Australian law in which the courts held that retrospective leave may be granted. (see *Oceanic Life Ltd v. Insurance and Retirement Services Pty Ltd (In Liquidation)* [1993] 11 ACSR 516; *Re Sydney Formworks Pty Ltd (In Liquidation)* [1965] NSWR 646; *Humphris v. Jenshol* [1997] 25 ACSR 212 and *Emanuele v. Australian Securities Commission* [1997] HCA 20).

[42] From the analysis of the authorities, leave may be granted retrospectively after commencement of proceedings. The proceedings will not be a nullity for or want of prior leave.

[43] In *In Re Saunders* (*supra*), the question was whether proceedings against a bankrupt could be retrospectively authorised. The court held as follows:

> In our view, the purposes of the insolvency legislation can quite well be served without requiring that a summons served, or an application made, without prior consent should be considered to be a nullity or incompetent. The purpose of the legislation is, in general terms, to prevent the liquidators' or administrators' task being made more difficult by a scramble among creditors to raise actions, obtain decrees or attach assets. *We cannot, however, see that there is any reason why it should be necessary for the provision of such protection to treat any proceedings which may, for one reason or another, be commenced without consent as null and, therefore, incapable of proceeding further*.
>
> (emphasis added)

[44] *In Re Saunders* (*supra*) was quoted with approval in the case of *Gaardsoe* (*supra*): The Queen's Bench Division dealt with the issue of whether the absence of prior permission has the consequence that the proceedings were a nullity.

A 12. I deal first with the question of whether the absence of prior permission has the consequence that the proceedings were a nullity. This is, of course, the issue that arises directly in the defendant's Queen's Bench application; but it is, in my view, necessary also for me to decide it. *In my judgment the proceedings are not a nullity. They are, to quote from the judgment of Lindsay J in In re Saunders (A Bankrupt) [1997] Ch 60, 82b, "existing*
B *and capable of redemption by the late giving of leave.* …

(emphasis added)

[45] In *Adorian* (*supra*), the court took into account the issue of limitation coming into play in the event a pre-emptive action is not taken to commence proceedings before seeking leave or permission from the courts. It held as
C follows:

[41] *It follows, as it does in limitation cases, that a lawsuit within s. 329, begun without permission, can properly proceed to trial if the permission point is not taken*. Where the claim is plainly eligible for permission, this is an economical and practical course. If it were, otherwise, the point could not only be
D unanswerably taken against the claimant at an advanced stage of the proceedings, and costs be resisted on the ground that the progress of the action without permission has been entirely unlawful, but the judge would be required to take the point at trial. *Moreover, a perfectly sound claim issued late in the limitation period could be defeated, or at least placed at risk, by an opportunistic motion to strike it out, brought in the knowledge that by the time*
E *permission could now be obtained the claim will be out of time. In any such event a case which everyone knows is perfectly sound would collapse.*

(emphasis added)

[46] This court is also of the opinion that there is no express prohibition in s. 451(2) of the Act to the like effect. It would be a different consideration
F if there is an express prohibition in the language of the legislation to disallow any party from seeking leave retrospectively. Furthermore, the provision does not stipulate the consequences of such non-compliance.

[47] In *Re MJBCH Ltd* (*supra*), it was held that:

G [20] In my judgment, having regard to the purpose of s. 222 as set out above and the above constitutional principles, in the absence of express words which provide that the commencement of proceedings without leave of the court in breach of s. 222 render proceedings a nullity or which preclude the court from granting leave for commencement after the event, s. 222 should not be so construed. *Whilst s. 222, by its express words provides*
H *"no action or proceeding shall be proceeded with or commenced against the company except by leave of the court", it does not provide for the consequences of the commencement of an action without leave of the court.* Further, while the words "except by leave of the court" are open to the construction that leave should be obtained prior to commencement, *it does not appear to me that, having regard to the statutory purpose and the necessity to construe the restriction on*
I *access to the courts strictly, that these words should be construed as precluding the court granting leave for the commencement of the action after the event.*

(emphasis added)

Conclusion

[48] The rationale for leave, which primarily is to safeguard the interest of the wound-up company, is the basis why leave of court is required. Be that as it may, in discharging its discretion, the courts will have a duty to consider the interest of all parties. This will include the interest of the applicants in order to avoid meritorious claims from being shut out.

[49] Courts will act as the gatekeeper in determining whether leave should be granted based on the principles in *Mosbert* (*supra)* and *Shencourt* (*supra*). Once the requirements are fulfilled, it matters not if leave is late or obtained after the commencement of the particular action.

[50] In the circumstances, this court in exercising its powers under s. 451 of the Act, is of the view that the applicants are entitled to leave. The amended originating summons in encl. 13 is therefore allowed with costs in the cause.